Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1073–06 OF 2016
ABANG ISKANDAR, MARY LIM AND SURAYA OTHMAN JJCA
11 JANUARY 2018

Civil Procedure — Pleadings — Defamation — Libel — Whether defences of reportage and responsible journalism were mutually exclusive and incompatible — Whether both defences could not be pleaded in alternative — Whether once defendant relied on defence of reportage it was 'forensically problematical' to fall back upon alternative defence of responsible journalism — Whether pleaders had to decide which it was to be: reportage or responsible journalism — Whether reportage involved complete neutrality whereas responsible journalism permitted justified offering of a view

Tort — Defamation — Libel — Whether defence of reportage separate and distinct defence from responsible journalism and qualified privilege — Whether defence of reportage could not be relied upon if it was not specifically pleaded — Whether merely pleading responsible journalism or qualified privilege insufficient for a party to rely on reportage — Whether party could not plead responsible journalism and reportage as alternative defences in same pleading — Whether reporting had to be fair, disinterested and neutral for defence of reportage to succeed — Whether respondents failed even on defences of responsible journalism and qualified privilege as they failed to meet ten-point Reynolds test — Whether malice proven against respondents to sustain claim for malicious falsehood

The appellant sued the respondents for defamation and malicious falsehood over three articles and two videos that were published in an online news portal operated by the first respondent ('R1'). The other three respondents, who were then employed by R1, had authored the three articles, two of which were linked to the videos. The articles and the videos alleged that the appellant's use of cyanide in carrying out gold mining operations in Bukit Koman in Raub, Pahang, had adversely affected the health of the nearby villagers, decimated wildlife and vegetation in their area and polluted the environment. The appellant claimed that the content of the articles/videos was false and defamatory and was published maliciously to injure the appellant's reputation and business. The two videos depicted press conferences — one, by a group claiming to be members of a village committee ('BCAC') protesting against the appellant's operations; the other, by persons claiming to be opposition party

politicians declaring that they would stage a public rally to protest against the appellant's operations. The respondents relied on the defences of fair comment, qualified privilege and responsible journalism and although they did not specifically plead the defence of reportage, they also relied upon that defence. The High Court dismissed the appellant's claims, finding that although the impugned articles and videos defamed the appellant, they concerned a matter of public interest and the respondents had successfully raised the defence of qualified privilege encompassing both the *Reynolds* privilege defence of responsible journalism and the defence of reportage (the *Reynolds* privilege defence was propounded by the House of Lords in *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609; [2001] 2 AC 127). The trial judge found that even though the defence of reportage was not specifically pleaded, the respondents could rely upon it as it was one form of the *Reynolds* privilege defence and a part of the qualified privilege defence which the respondents had already pleaded. The High Court rejected the claim for malicious falsehood on the ground malice on the respondents' part had not been proven. The issues that arose for determination in the instant appeal against the trial court's decision was whether qualified privilege and reportage were separate and distinct defences that had to be separately pleaded, whether the respondents could avail of either of those defences, and whether there was malice on the respondents' part.

Held, affirming the dismissal of the claim for malicious falsehood, allowing the appeal against the dismissal of the claim for defamation, awarding the appellant RM200,000 in general damages and granting an injunction to restrain the respondents or its officers, servants and agents from further publishing, circulating and distributing the impugned articles and videos:

(1) Although the trial judge was correct in finding that the information contained in the respondent's articles and videos was a matter of public concern or interest, the respondents had not acted fairly and responsibly and could not rely on the defence of responsible journalism as they failed to meet the relevant ten-point test propounded in *Reynolds*. With regard to the first article, except for seeking confirmation from the residents of Bukit Koman through the chairman of the BCAC, the verification stopped there. The respondents made no attempts or efforts to contact other experts on the matter or to contact the appellant to get its side of the story. Merely contacting the chairman of the BCAC was grossly inadequate. The article made very serious allegations against the appellant and its tone was extremely accusatory and damaging. Due to the seriousness of the allegations, responsible journalism warranted a fair and balanced reporting where the appellant should have been given an opportunity to answer the accusations (see paras 29 & 38–40).

(2) The trial judge erred in finding that the respondents could rely on the defence of reportage by just pleading the defence of qualified privilege. A

defendant could not rely on reportage by just pleading the defence of responsible journalism. Although reportage emanated from the same product (responsible journalism), it had distinctive features of its own which set it apart from the defences of responsible journalism or qualified privilege. If the respondents wanted to rely on the defence of reportage, they should have expressly pleaded that defence so that the appellant was not taken by surprise. By not pleading reportage, the respondents were precluded from relying on that defence or from proving reportage at trial. The defences of reportage and responsible journalism were in effect mutually exclusive and incompatible in that once reportage was relied upon, it was 'forensically problematical to fall back upon an alternative defence of responsible journalism' (per Sedley LJ in *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750). In the case of reportage, there was, inter alia, complete neutrality which inferred a state of mind and intent whereas in responsible journalism, a view might be justifiably proffered. The respondents should have decided which of the two they wanted to plead — reportage or responsible journalism. Pleading in the alternative did not work here (see paras 63 & 69).

(3) Even if a plea of qualified privilege or responsible journalism encompassed a plea of reportage without the need to expressly plead the latter, the evidence as a whole, considered objectively, showed that the respondents could not avail of the defence of reportage. The allegations made against the appellant were not reported in a fair, disinterested and neutral manner. The reporting was unbalanced and slanted against the appellant. The respondents had not only embellished the allegations against the appellant but had embraced and adopted them as the truth and as their own (see paras 70 & 74–76).

(4) Although the respondents' conduct displayed irresponsible journalism and partiality in their reporting which could not be justified under the cover of public interest, it was insufficient to constitute malice to sustain a cause of action for malicious falsehood. The appeal against the dismissal of the claim for malicious falsehood was therefore dismissed (see para 77).

(5) The appellant had not proven to what extent its business or trade was affected by the impugned articles and videos. On the other hand, the respondents' attitude throughout was unyielding, unrepentant and arrogant. They refused to retract or apologise for the libel. Considering all the facts and circumstances, the court was of the view that a global sum of RM200,000 was adequate as general damages to the appellant for loss of goodwill and vindication of its reputation (see paras 82, 85 & 92).

[Bahasa Malaysia summary

Perayu telah menyaman responden-responden kerana fitnah dan kepalsuan yang berniat jahat terhadap tiga artikel dan dua video yang diterbitkan dalam

portal berita atas talian yang dikendalikan oleh responden pertama ('R1'). Tiga responden lain, yang kemudiannya bekerja dengan R1, telah menulis tiga artikel, dua daripadanya telah dikaitkan dengan video-video tersebut. Artikel-artikel dan video-video tersebut mengatakan bahawa penggunaan sianida oleh perayu dalam menjalankan operasi perlombongan emas di Bukit Koman di Raub, Pahang, telah menjejaskan kesihatan penduduk kampung berdekatan, menghapuskan hidupan liar dan tumbuh-tumbuhan di kawasan mereka dan mencemarkan alam sekitar. Perayu mendakwa bahawa kandungan artikel/video tersebut adalah palsu dan berunsur fitnah dan diterbitkan secara berniat jahat untuk menjejaskan reputasi dan perniagaan perayu. Kedua-dua video tersebut menggambarkan persidangan akhbar — satu, oleh kumpulan yang mendakwa sebagai ahli jawatankuasa kampung ('BCAC') yang membantah terhadap operasi perayu; yang lain, oleh orang yang mengaku sebagai ahli politik parti pembangkang yang mengumumkan bahawa mereka akan mengadakan perhimpunan awam untuk membantah terhadap operasi perayu. Responden-responden bergantung kepada pembelaan komen yang adil, perlindungan bersyarat dan kewartawanan yang bertanggungjawab dan meskipun mereka tidak secara khusus merayu pembelaan laporan, mereka juga bergantung pada pembelaan tersebut. Mahkamah Tinggi menolak tuntutan perayu, mendapati bahawa walaupun artikel-artikel dan video-video yang diragui telah memfitnah perayu, ia adalah berkenaan hal kepentingan awam dan responden-responden telah berjaya menimbulkan pembelaan perlindungan bersyarat yang merangkumi kedua-dua pembelaan perlindungan *Reynolds* berhubung kewartawanan yang bertanggungjawab dan pembelaan laporan (pembelaan perlindungan *Reynolds* telah diusulkan oleh House of Lords dalam kes *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609; [2001] 2 AC 127). Hakim perbicaraan mendapati bahawa meskipun pembelaan pelaporan tidak dipli secara spesifik, responden-responden boleh bergantung kepadanya kerana ia adalah salah satu bentuk pembelaan perlindungan *Reynolds* dan sebahagian daripada pembelaan perlingungan bersyarat yang mana telahpun dipli oleh responden-responden. Mahkamah Tinggi telah menolak tuntutan untuk pemalsuan yang berniat jahat atas alasan niat jahat di pihak responden-responden tidak dibuktikan. Isu-isu yang timbul untuk ditentukan dalam rayuan ini terhadap keputusan mahkamah perbicaraan adalah sama ada perlindungan bersyarat dan pelaporan adalah pembelaan berasingan dan berbeza yang telah dipli secara berasingan, sama ada responden-responden boleh memanfaatkan mana-mana daripada pembelaan tersebut dan sama ada terdapat niat jahat di pihak responden-responden.

Diputuskan, mengesahkan penolakan tuntutan untuk pemalsuan yang berniat jahat, membenarkan rayuan terhadap penolakan tuntutan untuk fitnah, mengawardkan perayu RM200,000 sebagai ganti rugi am dan memberikan injunksi untuk menghalang respoden-responden atau pegawai, pekerja dan ejennya daripada menerbit, mengedar dan mengedar

artikel-artikel dan video-video yang dipersoalkan:

(1) Walaupun hakim perbicaraan adalah betul dalam mendapati bahawa maklumat yang terkandung dalam artikel-artikel dan video-video responden merupakan perkara berhubung kepentingan dan hal awam, responden-responden telah tidak bertindak secara adil dan bertnggungjawab dan tidak boleh bergantung kepada pembelaan kewartawanan yang bertanggungjawab kerana mereka telah gagal memenuhi ujian sepuluh-poin yang relevan sebagaimana dinyatakan dalam kes *Reynolds*. Berhubung artikel pertama, kecuali yang meminta pengesahan daripada pemastautin Bukit Koman melalui pengerusi BCAC, pengesahan itu berhenti di situ. Responden-responden tidak cuba atau berusaha untuk menghubungi pakar lain mengenai perkara itu atau menghubungi perayu untuk mendapat versinya. Hanya dengan menghubungi pengerusi BCAC adalah tidak mencukupi. Artikel itu membuat dakwaan-dakwaan serius terhadap perayu dan nadanya yang menuduh dan menjejaskan. Akibat keseriusan dakwaan itu, kewartawanan yang bertanggungjawan mewajarkan pelaporan yang adil dan seimbang di mana perayu patut diberikan peluang untuk menjawab dakwaan-dakwaan tersebut (lihat perenggan 29 & 38–40).

(2) Hakim perbicaraan terkhilaf apabila mendapati responden-responden boleh bergantung kepada pembelaan pelaporan dengan hanya mempli pembelaan untuk perlindungan bersyarat. Defendan tidak boleh bergantung kepada pelaporan dengan hanya mempli pembelaan untuk kewartawanan bertanggungjawab. Walaupun pelaporan tercetus daripada produk yang sama (kewartawanan yang bertanggungjawab), ia mempunyai ciri-ciri tersendirinya yang membezakannya daripada pembelaan kewartawanan yang bertanggungjawab atau perlindungan bersyarat. Jika responden-responden ingin bergantung kepada pembelaan pelaporan, mereka hendaklah dengan jelas mempli pembelaan tersebut agar perayu tidak terkejut. Dengan tidak mempli pelaporan, responden-responden dihalang daripada bergantung kepada pembelaan tersebut atau daripada membuktikan pelaporan tersebut semasa perbicaraan. Pembelaan-pembelaan berhubung pelaporan tersebut dan kewartawanan yang bertanggungjawab itu mempunyai kesan yang saling eksklusif dan tidak sesuai jika bergantung kepada pelaporan tersebut, ia adalah 'forensically problematical to fall back upon an alternative defence of responsible journalism' (oleh Sedley LJ dalam *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750). Dari segi pelaporan, terdapat, antara lain, kesinambungan lengkap yang memberi kesimpuan tentang keadaan fikiran dan niat sedangkan dalam kewartawanan yang bertanggungjawab, pandangan mungkin dibenarkan. Responden-responden patut memutuskan yang mana daripada dua perkara tersebut yang ingin diplikan oleh mereka — pelaporan atau kewartawanan yang bertanggungjawab. Pliding secara

alternatifnya tidak berkesan di sini (lihat perenggan 63 & 69).

(3) Jikapun pli untuk perlindungan bersyarat atau kewartawanan bertanggungjawab meliputi pli pelaporan tanpa keperluan untuk mempli dengan jelas mengenai pelaporan itu, keterangan secara keseluruhannya, dipertimbangkan secara objektif, menunjukkan bahawa responden tidak menggunakan pembelaan berhubung pelaporan. Pengataan yang dibuat terhadap perayu tidak dilaporkan secara adil, tanpa kepentingan dan neutral. Pelaporan itu tidak seimbang dan condong terhadap perayu. Responden-responden bukan hanya membuat pengataan-pengataan terhadap perayu tetapi telah menggunakan dan menerima pakainya sebagai kebenaran dan sebagai mereka sendiri (lihat perenggan 70 & 74–76).

(4) Walaupun perbuatan responden-responden menunjukkan kewartawanan yang tidak bertnggungjawa dan sebahagian daripada pelaporan mereka tidak wajar di bawah perlindungan kepentingan awam, ia tidak mencukupi untuk membentuk niat jahat bagi mengekalkan kausa tindakan untuk pemalsuan yang berniat jahat. Rayuan terhadap penolakan tuntutan untuk pemalsuan yang berniat jahat dengan itu ditolak (lihat perenggan 77).

(5) Perayu tidak membuktikan setakat mana perniagaan atau dagangannya terjejas oleh artikel-artikel dan video-video yang dipersoalkan itu. Sebaliknya, sikap responden-responden secara keseluruhan tidak menunjukkan kesetiaan, tidak bersalah dan sombong. Mereka enggan menarik balik atau memohon maaf untuk libel. Berdasarkan semua fakta dan keadaan, mahkamah berpendapat bahawa jumlah global RM200,000 adalah mencukupi sebagai ganti rugi am kepada perayu untuk kehilangan nama baik dan usaha mempertahankan reputasinya (lihat perenggan 82, 85 & 92).]

Notes

For cases on defamation, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7365–7369.

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 597–835.

Cases referred to

Adam v Ward [1917] AC 309, HL (refd)

Al-Fagih v HH Saudi Research & Marketing (UK) Ltd [2001] EWCA Civ 1634; [2000] EMLR 215, CA (refd)

Applause Store Productions Ltd and another v Raphael [2008] EWHC 1781 (QB), QBD (refd)

Bonnick v Morris [2002] UKPC 31; [2002] 12 BHRC 558; [2003] 1 AC 300, PC (refd)

A *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750, CA (folld)
Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492, HC (refd)
B *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807, HC (refd)
English and Scottish Co-Operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd and Another [1940] 1 All ER 1; [1940] 1 KB 440, CA (refd)
C *Flood v Times Newspapers Ltd* [2012] 2 WLR 760; [2012] UKSC 11; [2012] 2 AC 273, SC (refd)
Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor [2015]6 MLJ 449, FC (consd)
Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors [2012] 4 MLJ 191, CA (consd)
D *Jameel and another v Wall Street Journal Europe SPRL* [2006] 4 All ER 1279; [2006] UKHL 44; [2007] 1 AC 359; [2006] 3 WLR 642, HL (refd)
Loutchansky v Times Newspapers Ltd [2002] QB 783; [2001] EWCA Civ 1805, CA (refd)
E *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (consd)
Reynolds v Times Newspapers Ltd and others [1999] 4 All ER 609; [2001] 2 AC 127, HL (folld)
Roberts and another v Gable and others [2008] 2 WLR 129, CA (refd)
F *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234, HL (refd)
Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd [2010] 9 MLJ 320, HC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee [2015] 6 MLJ 187, FC (folld)
G *Tan Ah Tong v Parveen Kaur* [2011] 5 MLJ 428, CA (consd)

Appeal from: Civil Suit No 23NCVC-108–09 of 2012 (High Court, Kuala Lumpur)

H *Cecil Abrahim (Sunil Abraham, Elaine Alexander and Daniel Chua with him) (Cecil Abraham & Partners) for the appellant.*
James Khong (Syahredzan Johan with him) (James Khong) for the respondents.

Suraya Othman JCA (delivering judgment of the court):

I INTRODUCTION

[1] This is an appeal against the decision of the High Court on 10 June 2016 dismissing the appellant/plaintiff's claims premised on the tort of defamation and malicious falsehood in respect of three articles and two videos published in

the *Malaysiakini* news portal by the first respondent/defendant. A

[2] We heard the appeal over two non-consecutive days. On the second day of hearing, that is on 22 June 2017, learned counsel for the appellant advised this court that the appellant has been voluntarily wound up by its creditors and that he has been given a warrant to act for the appellant's behalf on 19 June 2017. This was confirmed by learned counsel for the respondents as per affidavit affirmed on 21 June 2017 (see encl 8). We then proceeded to continue to hear the case and having perused the appeal records and given due consideration to the respective oral and written submissions of counsel, we reserved our decision. We now give our decision and our reasons for the same. B C

BACKGROUND FACTS

[3] The appellant, Raub Australian Gold Mining Sdn Bhd ('RAGM') operates a gold mine and produces gold bars at its carbon-in-leach ('CIL') plant. The appellant is the only company operating gold mining operations in Bukit Koman, Raub, Pahang. D

[4] The first respondent, Mkini Dotcom Sdn Bhd is a company that owns and operates an online news portal known as *Malaysiakini* which website is www.malaysiakini.com. The second respondent, Lee Weng Keat is the assistant news editor of *Malaysiakini*. The third respondent, Wong Teck Chi is the senior journalist of *Malaysiakini*. The fourth respondent, Victor TM Tan was at the material time, an intern at *Malaysiakini* and was pursuing a degree in Bachelor of Arts in Journalism. E F

[5] The appellant's claim against the respondents arose out of three articles and two videos published by the first respondent on its online news portal, http://www.malaysiakini.com. The subject matter of these articles and videos published in 2012, is in relation to the gold mining activities of the appellant, which the respondents alleged had used cyanide, and that such use had caused serious illness to the villagers and death of wildlife and vegetation and environmental pollution in Bukit Koman. The appellant claimed that the words complained of or the impugned statements in the said articles and videos were false and defamatory in nature and were published by the respondents maliciously with intent to injure the appellant's reputation, trade and business. The articles and videos published are as follows: G H

(a) 'Villagers Fear For Their Health Over Cyanide Pollution' dated 19 March 2012 ('the first article') which was authored by the second respondent; I

(b) '78 pct Bukit Koman Folk Have 'Cyanide-Related' Ailments' dated 21 June 2012 ('the second article') which was authored by the third respondent;

(c) a video presentation published on 21 June 2012 that was linked with the second article ('the first video');

(d) 'Raub Folk To Rally Against 'Poisonous Gold' dated 2 August 2012 ('the third article') authored by the fourth respondent; and

(e) a video presentation published on 2 August 2012 that was linked with the third article ('the second video').

[6] The impugned part of the first article which is found in para 7 of the statement of claim reads as follows:

(a) 'Besides suffering from the unbearable stench overnight, villagers have also found yellow powdery spots around their neighbourhood in Bukit Koman, Raub, where gold-mining activities using cyanide, a hazardous chemical, started three years ago';

(b) 'According to the blog, since the commencement of the gold-mining activities, birds such as pigeons and crows, and lizards and vegetable cultivated in the neighbourhood have been found dead';

(c) 'Villagers suspect the unexplained deaths, the stench of herbicide during the night, and the illness, are the results of cyanide pollution'; and

(d) 'Committee chairperson Wong Kin Hoang told Malaysiakini that the yellow spots may be residue from emissions from the mining operations.'.

[7] The impugned part of the second article which is found in para 10 of the statement of claim reads as follows:

(a) 'A recent survey done by Bukit Koman villagers revealed that 78.1 percent of the residents in surrounding areas were suffering health problems, which is believed to be related to cyanide used in local gold mine. Topping the list was skin itchiness and rashes (50.1 percent), followed by eyesores/itchiness/dimness (43.9 percent), dizziness/headache (35 percent), fatigue (34.5 percent) and cough (33.4 percent)';

(b) 'It is also revealed that the figures were higher among the residents who stay in Bukit Koman New Village, where 84.8 percent of the villagers said they have suffered at least one health problem, while 57.2 percent said their health conditions worsened after 2009, when the gold mine started operations';

(c) 'Residents of the Bukit Koman New Village had for a very long time alleged that cyanide, which is used in the nearby mine, had led to a range of skin, eye and respiratory ailments. This is the first time they have carried out a survey scientifically to substantiate their claim'; and

(d) 'Dermatologist Khim Pa, who has 26 years experience in practice, also added that the results clearly showed that there is 'irritating' material on the air which caused the health problems. 'It is quite clear that more than 50 percent of people facing itchiness means that there is something in the air irritating to the eye and the skin ... It is worse on the expose parts of the skin. If the same particles goes into the lungs, they will cause coughing' said the doctor during a press conference held yesterday at the Kuala Lumpur and Selangor Chinese Assembly Hall.'.

[8] The first video was linked to the second article. It depicted a press conference held by several individuals holding themselves out as members of the Bukit Koman Action Committee against the Use of Cyanide in Gold Mining or also known as Ban Cyanide Action Committee ('BCAC'). The words complained of, as uttered in the first video, are found in para 17 of the statement of claim and reads as follows:

(a) 'As specified complaints such as giddiness and lethargy was also high and above 35% and the residents are aware of the business of the gold mine and gold extracting facility RAGM near to their home';

(b) 'Persistent and strong cyanide like odour has been detected by majority of the residents since the Raub plant started operation in February 2009, such odour has been, never been present and common in prior times';

(c) 'And as for other kampung they also have changes but the numbers is a bit lower that is around 38%. Now if you're looking at two age group there's no, again there is no significant difference between the young respondent that is below 18 years old and the above 18 years old they are all both in generally around more than 58% are responded that their health conditions are deteriorated since the plant operation in 2009'; and

(d) 'So in conclusion we can say that the villagers are facing something external as from environment causing epidemic, widespread epidemic of skin diseases, eye irritation, coughing, and they now fear that if the water source is contaminated with cyanide, they are worrying about whether the slightly high increase of cancers are due to water contamination itself.'.

[9] The impugned part of the third article which is found in para 19 of the statement of claim reads as follows:

(a) 'Residents of Bukit Koman, Raub are scheduled to hold a mass protest rally against the use of cyanide for gold mining activities by the Raub Australian Gold Mine (RAGM) Sdn Bhd in their neighbourhood.';

(b) 'It has been more than 1,000 days since RAGM had started making money by extracting 'dirty gold', using life threatening cyanide compounds.';

(c) 'No doubt that the mine bosses are laughing to their banks for they care not about the Raub residents,' said committee chairperson Wong Kin Hoang told a press conference in Kuala Lumpur today.';

(d) 'Wong said that the refinery has been spewing pollutants 24 hours everyday but those who speak up are harassed.';

(e) 'We are not against profit-making businesses, it just happened that this gold mine operates in a very unethical way that pollutes the environment and bring harm to our lives,' said Wong.';

(f) 'On June 21, the committee had alleged that survey done on May 19 and 20 revealed that 78.1 percent of the residents in surrounding areas were suffering health problems, believed to be related to the cyanide used in local gold mine.'; and

(g) 'This will be like that we did in February in Kuantan. We must stop irresponsible individuals who continue to pollute the planet,' he said.'.

[10] The second video was linked to the third article. It depicted a press conference by several individuals including several politicians from PAS and DAP holding out as the 'Himpunan Hijau Raub'. The press conference was about the intended rally to protest the appellant's gold mining activities to be held on 2 September 2012. The words complained of, as uttered in the second video, are found in para 25 of the statement of claim and reads as follows:

(a) 'Lebih seribu hari telah berlalu setelah kilang emas RAGM mula mendapat keuntungan dari mengekstrak emas dengan menggunakan cyanide yang membahayakan nyawa tidak syak lagi tauke-tauke lombong pergi ke bank dengan senyum lebar';

(b) 'Mereka tidak kisah tentang penduduk Raub terutamanya dari Bukit Koman yang hidup dalam kesengsaraan dan ketakutan';

(c) 'Ramai yang sihat sebelum ini telah jatuh sakit dan kegatalan yang tak tertahan, ruam-ruam yang terlampau, batuk berterusan, simptom-simptom lain yang membimbangkan namun yang memedihkan lagi, semua aduan dan rayuan yang membawa kepada pihak berkuasa tidak mendapat perhatian yang sewajarnya. Mereka tidak melakukan apa-apa yang membuktikan yang kilang itu selamat';

(d) 'Kerajaan membenarkan kilang yang berkemungkinan besar tercemar, ia beroperasi selama 24 jam sehari, 7 hari seminggu tanpa henti pada masa yang sama penduduk membantah Ielah ditekan dan diperbodohkan selama 3 tahun ini'; dan

(e) 'Marilah kita bersama-sama menyertai himpunan hijau Raub pada 2 September 2012, pukul 2 petang untuk memperjuangkan, menentang perlombongan emas yang kotor, yang menggunakan sianida.'. A

The English translation of the words complained of, are as follows: B

(a) 'More than a thousand days have passed since the RAGM gold plant started to reap profits by extracting gold using life-threatening cyanide, and no doubt the owners of the mine are laughing all the way to the bank';

C

(b) 'They couldn't care less about the people of Raub, especially those from Bukit Koman who live in suffering and fear';

(c) 'Many who were healthy have now fallen ill. They complain of unbearable itch, acute rashes, continuous coughing, other worrying symptoms and what's even more upsetting, all complaints and appeal to the authorities have not received appropriate actions. They have done nothing to prove that the factory is safe'; D

(d) 'The Government has allowed a factory which is most likely a pollutant, it operates for 24 hours a day, 7 days a week non stop whilst the residents who object are pressured and made fools of in these past three years'; and E

(e) 'Let us all join the Raub green rally on 2 September 2017, at 2pm to champion, fight the dirty gold mine, which uses cyanide.'.

F

[11] The respondents in their defence denied that the words complained of or the impugned statements in the said articles and videos were defamatory in nature and relied on the defence of fair comment. Further and/or in the alternative, the respondents relied on the defence of qualified privilege and the related defence of responsible journalism. The respondents maintained that the articles and videos were published pertaining to matters of public interest, not just in Raub, but on a national scale. In submission, after full trial, the defence of reportage was also raised, though not specifically pleaded. G

[12] After a full trial, where 15 witnesses gave evidence, the learned trial judge found that the words complained of in all the three articles and the two videos were defamatory in nature, refers to the appellant and were published. The findings of the trial judge that the appellant has established a prima facie case of defamation was not disputed by the respondents since there was no cross-appeal filed by them. H I

[13] The trial judge found, that although the articles and videos were defamatory, the respondents had successfully raised or availed themselves to the defence of qualified privilege which according to the trial judge encompasses

A both the *Reynolds* privilege defence of responsible journalism and the defence of reportage. On that note, the trial judge dismissed the appellant's claim. Aggrieved with the decision of the trial judge, the appellant had filed this appeal to this court. However, we note that there were no findings made by the learned trial judge on the defences of fair comment and qualified privilege. Since there were no cross-appeals on these findings, we shall not deliberate on them.

B

DECISION OF THE TRIAL JUDGE

C **[14]** As stated earlier, the trial judge found that the respondents has successfully availed themselves to the defence of qualified privilege, specifically the defence known as the *Reynolds* privilege as propounded by the House of Lords in *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609; [2001] 2 AC 127. According to the trial judge, the publication of the first article is protected under the defence of responsible journalism and the second and third articles and the first and second videos are protected under the defence of reportage. In gist the grounds of judgment of the trial judge are summarised below:

D

E (a) in order to succeed with the defence of qualified privilege or the *Reynolds* privilege, two prerequisites must be satisfied before the defendants can avail to it. They are:

(i) the publication concerned a matter of public interest; and

F (ii) responsible and fair steps had been taken to gather, verify and publish the information;

(b) any matter that concerns the health, well-being and safety of a community is always a matter of public concern. Prior to the publication of the articles and videos, there was already extensive coverage by other medias on the issue of gold-mining activities using cyanide in the plaintiff's carbon-in-leach plant in Bukit Koman. The issue was also raised in the Pahang Legislative Assembly. Further, there was legal proceeding instituted by four members of the Bukit Koman residents to challenge the environment impact assessment report pertaining to the mining and extracting of gold in Bukit Koman. Therefore, there was clear evidence that the issue pertaining to the concern of the Bukit Koman residents about the operation of gold mine in their town was a matter of public interest;

G

H

I (c) the first article merely reported the concern of the Bukit Koman residents as to their health and suspicion that the air pollution may be caused by the plaintiff's gold-mining operation. Thus, the first article, read as a whole, made no allegations or criticism against the plaintiff. Further, the act of the second defendant contacting the Chairman of the Bukit

Koman Anti-Cyanide Committee prior to the publication of the first article was sufficient to constitute responsible journalism. The first article was not about the truth or otherwise of the contents therein but a report on the concern of the Bukit Koman residents regarding the air pollution which they suspected was caused by the plaintiff's plant. The defendants had therefore satisfied the test of responsible journalism;

(d) the second article with link to the first video and the third article with link to the second video were reproduction of two press conferences held by Ban Cyanide Action Committee. There was no evidence that the defendants had adopted the contents of the articles and videos as their own. The articles and videos were matters of public concern where the public in general had the right to know the information and the defendants as media and journalists were under a moral duty to publish the same. In the circumstances, the defence of reportage was clearly available to the defendants with regard to the publication of the second and third articles and the first and second videos;

(e) malice can be inferred through conduct of a journalist, such as when he showed no interest in seeking to verify the truth of the information despite him having serious doubt as to its truthfulness. However, the first defendant had not only been publishing news reports that were deemed adverse to the plaintiff, but had also published news reports that were seen as favorable to the plaintiff. Hence, the articles and videos were published in a fair, disinterested and neutral way. There was no evidence of malice shown on part of the defendants; and

(f) the vital ingredient in the tort of malicious falsehood is that the impugned statements, apart from being false, is published maliciously. As the plaintiff had not proven malice, it followed that the plaintiff's claim for malicious falsehood must also fail.

MEMORANDUM OF APPEAL

[15] The appellant raised 18 grounds of appeal. In essence, the 18 grounds raised five core issues to be dealt with by this court, which are:

(a) *preliminary issue*: whether the defence of qualified privilege and the defence of reportage are separate and distinct defences?

(b) *first issue*: whether the words complained of in the articles and videos were published by the respondents on an occasion of qualified privilege?

(c) *second issue*: whether the words complained of in the articles and videos were published by the respondents on an occasion of reportage?

(d) *third issue*: if the respondents have availed themselves of the defence of

qualified privilege, whether the defence is defeated by the respondents' malice?

(e) *fourth issue*: whether the respondents published the articles and videos maliciously? and

(f) *fifth issue*: whether the appellant is entitled to the relief prayed for in sub-paras (i)–(x) of para 39 of the statement of claim?

OUR GROUNDS OF DECISION

[16] This appeal is a broad challenge of the numerous findings of fact made by the learned trial judge with regard to the issues of 'public interest', 'qualified privilege', '*Reynold*'s privilege defence', 'the defence of reportage' and 'malice', after a full trial. In arriving at her findings of fact on these issues, the learned trial judge had heard the oral evidence of 15 witnesses and had perused through voluminous documentary evidence.

[17] The appellant contended that the learned trial judge fell into error in her findings that the respondents had availed themselves of the defence of qualified privilege and that through a pleading of qualified privilege, have availed themselves of the defence of responsible journalism for the first article, and the defence of reportage for the second and third articles and the first and second videos. The appellant contended that the respondents have practised irresponsible journalism and did not seek to verify whether the statements in the articles and videos were based on facts which are true. Further, the appellant contended that the defence of qualified privilege and the defence of reportage are separate and distinct defences and therefore mutually exclusive and the fact that the respondents had not specifically pleaded the defence of reportage precluded them from raising the same.

[18] The respondents, on the other hand, contended that the learned trial judge's approach was correct; that having found that all the articles and videos to be defamatory, the learned trial judge went on to examine whether the respondents had succeeded in establishing a defence of qualified privilege, specifically the defence known as the *Reynolds* privilege as propounded by the House of Lords in *Reynolds*. The respondents contended that the learned trial judge was correct in her findings that the *Reynolds* privilege has two prerequisites before a defendant can avail itself of this defence. These prerequisites are that the publication concerned a matter of public interest and responsible and fair steps had been taken by the defendant to gather and verify before publishing the information. It was only after going through this process that the learned trial judge found that the first article is protected by the defence of responsible journalism and the second and third articles and the first and second videos are protected by the defence of reportage.

QUALIFIED PRIVILEGE

[19] The test of determining an occasion of privilege is well explained by Lord Atkinson in *Adam v Ward* [1917] AC 309 which states:

> [A] privilege occasion is, in reference to qualified privileged, an occasion where the person who makes the communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made had a corresponding interest or duty to receive it. This reciprocity is essential.

[20] However, this privilege will only succeed if there was no malice on the part of the respondents in publishing the defamatory statements against the appellant. It is for the appellant to show that there was malice on the part of the respondents in publishing the defamatory statements and not the other way around.

REYNOLD'S RESPONSIBLE JOURNALISM

[21] The *Reynolds* privilege defence is a defence available to anyone who publishes any material of public interest in any medium. The defence is two-staged or two-pronged. First, the public interest test has to be satisfied. Once that is satisfied, the inquiry then shifts to whether the respondents acted reasonably in publishing the impugned words. The second test has been described as 'responsible journalism' — see Federal Court in *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187 at para 34. The focus, inter alia, is whether steps had been taken to verify, gather and publish the information in a responsible and fair manner. In *Bonnick v Morris* [2002] UKPC 31; [2002] 12 BHRC 558; [2003] 1 AC 300 at para [23], Lord Nicholls stated that 'the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalist pay in return for the privilege'.

[22] It is to be noted that for *Reynolds* privilege, the responsible journalism is focused on ensuring that journalists take reasonable steps in relation to the truth of any allegations which they report, as explained by Lord Bingham in *Jameel and another v Wall Street Journal Europe SPRL* [2006] 4 All ER 1279; [2006] UKHL 44; [2007] 1 AC 359; [2006] 3 WLR 642:

> [32] ... the rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify ... But the publisher is protected if he has taken such steps

A as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.

[23] The same point was re-iterated in *Flood v Times Newspapers Ltd* [2012] UKSC 11; [2012] 2 AC 273; [2012] 2 WLR 760. See para [75] per Lord Philips PSC:

> Not all the items in Lord Nicholls's list in the *Reynolds* case [2001] 2 AC 127 at p 205 were intended to be requirements of responsible journalism in every case. The first question is whether, on the facts of this case, the requirements of responsible journalism included a duty of verification and, if so, the nature of that duty. I should insert a word of warning at the outset. Each case turns on its own facts. I use the phrase 'duty of verification' as shorthand for a requirement to verify in the circumstances of this case. My comments should not be treated as laying down principles to be applied in cases of different facts.

See also *Loutchansky v Times Newspapers Ltd* [2002] QB 783; [2001] EWCA Civ 1805 for the view of the Court of Appeal.

[24] This two-staged test was adopted by Zawawi Salleh J, (now Court of Appeal judge), in *Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd* [2010] 9 MLJ 320 where he held:

> [39] Reverting back to the case at hand, for the defence of qualified privilege in the form of the Reynolds privilege to apply, two requirements must be shown to exist, namely:
>
> (a) that the publication concerned a matter of public interest; and
>
> (b) that the steps taken to gather, verify and publish the information were responsible and fair ('responsible journalism') (see *Duncan and Neill on Defamation* (3rd Ed) para 17.07, pp 205–206).

[25] The Federal Court in *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee*, has provided clear guidance for judges when considering the defence of qualified privilege. Azahar Mohamed FCJ, held, that it is not sufficient for a defendant relying on the *Reynolds* privilege defence to claim that he has an honest belief in the truth of the statements he made. He has to further exercise responsible journalism by considering the ten factors in *Reynold's*; the weight to be given to those factors would vary from case to case, before he can succeed to rely on that defence:

> [34] ... The *Reynolds* Privilege defence is predicated on public interest and responsible 'journalism'. In the context of the present case, the *Reynolds* Privilege defence required the defendant first, to establish that the public had a corresponding interest in receiving the same. Once that was established, the court must consider whether the defendant acted reasonably in publishing the impugned words. This second test has been described as the test of 'responsible journalism'.

[39] The guidelines as advocated by Lord Nicholls set out a number of important relevant matters to be taken into consideration in deciding whether the publication of impugned statements was privileged for the reason of its significance to the public at large. The list was not all-inclusive, but was explanatory only and the weight to be given to those and other pertinent aspects would vary from case to case. Secondly, according to the Court of Appeal, a defendant relying on the *Reynolds* privilege defence was absolved from proving that he took responsible and fair steps to gather, verify and publish the information, by simply claiming that he had an honest belief in the truth of the statements he made. With respect, this is plainly wrong. We agree with the submissions of learned counsel for the plaintiff that these new propositions by the Court of Appeal are diametrically opposed to the guidelines on responsible journalism as set out in *Reynolds v Times Newspapers Ltd*. In our view the guidelines on responsible journalism as espoused in *Reynolds v Times Newspapers Ltd* is important because there is now a much more extensive protection for publications to the public at large where the matter is of sufficient public concern. For that reason, as a counter-balance, publishers must meet the test of responsible journalism to ensure that the privilege is not abused. Rights and responsibilities must go hand in hand. Freedom of speech is not an end in itself; it must be exercised with a sense of responsibility. This point has already been made earlier but ought to be restated.

[26] As for the second test, the oft-cited ten-points list as set out in *Reynolds*, by Lord Nicholls is not exhaustive but merely illustrative. For completeness, the House of Lords in *Reynolds* at p 205, paras A–D, held as follows:

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including timing.

This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.

A PUBLIC INTEREST (THE FIRST TEST)

[27] The appellant contended that the respondents had failed to show that the contents of the articles and videos were a matter of public interest. This is so since the articles and videos published by the respondents had misinformed the public by framing the appellant as the cause of the villager's ill health, death of wildlife and vegetation and environmental pollution of Bukit Koman. In fact, the appellant contended that the respondents had used sensational headlines and inflammatory language which clearly demonstrate that there has been a sustained campaign on the part of the respondents against the appellant to damage the appellant's good name and reputation. This malicious intention, by targeting the appellant's mining operations, is to give wide political coverage to politicians of the federal opposition. Since the information are not true and accurate, the information are not of public interest.

[28] On public interest, the trial judge at para 23 in her grounds of judgment had stated as follows:

> The *Reynolds* privilege exists where public interest justifies the publication of the statement despite the fact that this carries the risk of defaming an individual who will have no remedy. It is a balancing act between the need for the public to receive the information and the potential harm that may be caused to the individual.
>
> On the issue of public interest, I believe the question that needs to be asked and answered is whether there was a need at the material time for the public in general to know about the information published in the said articles and videos and that the defendants as newspaper and journalist was under a public duty to tell the public. In my opinion any matter or issue that concern the health, well-being and safety of a community is always a matter of public concern, not just to that particular community but also to the general public. The defendants through their witnesses, particularly DW1, DW4 and DW10, have shown that prior to the publication of the said Articles and Videos, there was already extensive coverage by the other media on the issue of gold mining activities using cyanide and that the issue was also raised even in the Pahang Legislative Assembly. In 2006 onward, news began to emerge on a national scale that the residents of Bukit Koman started to raise protest on the use of cyanide in the plaintiff's gold mine. News articles began to be published in newspapers such as *Nanyang Siang Pau, The Star, Utusan Malaysia, Sin Chew Daily* and *China Press* surrounding the alleged use of cyanide in the plaintiffs Carbon-In-Leach plant in Bukit Koman. There was also legal proceedings by way of judicial review instituted by four members of the Bukit Koman residents in 2008 to challenge the Environment Impact Assessment Report pertaining to the mining and extraction of gold in Bukit Koman. The concern of the Bukit Koman's residents pertaining to the gold mining activity of the plaintiff has even led to the formation of the BCAC, a public interest group against the use of cyanide in gold mining. *In the circumstances, I think there is clear evidence that issue pertaining to the concern of the Bukit Koman's residents about the operation of the gold mine in their town was clearly a matter of public interest.* (Emphasis added.)

[29] Having perused para 23 of the learned trial judge's judgment as set out above, we find no error in the trial judge's reasoning that any matter or issue that concern the health, well-being and safety of a community is always a matter of public concern, not just to that particular community but also to the general public. As stated by the trial judge in her judgment, there was a need at the material time for the public in general to know and the defendants as a newspaper and as journalists were under a public duty to inform the public. This is so, as extensive coverage was given by the media (*Nanyang Siang Pau, The Star, Utusan Malaysia, Sin Chew Daily* and *China Press*) on the gold mining activities using cyanide resulting in the formation of BCAC, a public interest group against the use of cyanide in gold mining. Further, the legal proceedings by way of judicial review, instituted by four members of the Bukit Koman residents in 2008 to challenge the environment impact assessment report pertaining to the mining and extraction of gold in Bukit Koman culminating in these issues being raised in the Pahang Legislative Assembly kept the issue current, urgent and alive in the public domain. As such, in these circumstances, the learned trial judge was correct in finding that the information contained in the respondent's articles and videos are matters of public concern or interest.

THE SECOND TEST

[30] We now come to the second test. Have the respondents exercised responsible journalism by taking reasonable steps to gather, verify and publish the information in a responsible and fair manner. This is where the oft-cited ten-points test as set out in *Reynolds* by Lord Nicholls comes in. It must be emphasised that the ten-points or ten factors are illustrative and not exhaustive, and the weight to be given to these and other relevant factors, will vary from case to case. The ten-points or ten factors are:

(1) the seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true;

(2) the nature of the information, and the extent to which the subject matter is a matter of public concern;

(3) the source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories;

(4) the steps taken to verify the information;

(5) the status of the information. The allegation may have already been the subject of an investigation which commands respect;

(6) the urgency of the matter. News is often a perishable commodity;

(7) whether comment was sought from the plaintiff. The plaintiff may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary;

(8) whether the article contained the gist of the plaintiff's side of the story;

(9) the tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact; and

(10) the circumstances of the publication, including the timing.

THE FIRST ARTICLE

[31] The learned trial judge found that the first article is protected by the defence of responsible journalism. At paras 24–25 of her judgment, she states:

> [24] The first article published in *Malaysiakini* website on 19 March 2012, as testified by DW2 (the second defendant), was sourced from the news appearing in websites on the internet, particularly *Sin Chew Daily* website and *Nanyang Siang Pau* website. DW7 and DW8 confirmed that the news items exhs 015 and 016 respectively, were published on their respective newspaper's website. Exhibits 015 and 016 were about the concern of the villagers of Bukit Koman about air pollution caused by yellow substance floating in the air. DW2 also visited other blogs that spoke about the same subject matter. And finally, DW2 contacted and spoke to Wong Kin Hoang who was at the material time the Chairman of the Bukit Koman Anti-Cyanide Committee prior to the publication of the first article.
>
> [25] I am of the opinion that the first article merely reported the concern of the Bukit Koman's residents as to their health and the suspicion that the air pollution may be caused by plaintiff's gold mining operation. Reading the first article as a whole, one will find that it made no allegations or criticism against the plaintiff. In other words, there is no embellishment of the contents of the first article by the first and second defendants. Much has been argued by learned counsel for the plaintiff that the first and second defendants have not verified the contents of the first article with the plaintiff or with other experts before publishing the same. However, in my opinion the act of the second defendant contacting the Chairman of the Bukit Koman Anti-Cyanide Committee prior to the publication of the first article was sufficient in the circumstances of this case to constitute responsible journalism. This is because the first article is not about the truth or otherwise of the contents therein but a report on the concern of the Bukit Koman's resident regarding the air pollution which they suspect was caused by the plaintiff's plant. The defendants therefore has satisfied the test of responsible journalism.

[32] It is a finding of the learned trial judge that the first article, which were sourced from the websites of *Sin Chew Daily* and *Nanyang Siang Pau*, did not make any allegation or criticism against the appellant nor was there any embellishment to its contents. The learned trial judge felt that there was no necessity for the respondents to verify with the appellant or with other experts before publishing the same since verification was already sought from

Mr Wong Kin Hoang, the Chairman of the Bukit Koman Anti-Cyanide Committee ('BCAC') prior to its publication. To the learned trial judge, in the circumstances, this is sufficient to constitute responsible journalism since as she states it in para 25 of her judgment, 'the first article is not about the truth or otherwise of the contents therein but a report on the concern of the Bukit Koman's residents regarding the air pollution which they suspect was caused by the appellant's plant'.

[33] The question here is, whether the learned trial judge is correct. Was responsible journalism exercised in the publication of the first article?

[34] The respondents took the position that the learned trial judge arrived at the right conclusion in that they need not verify or seek confirmation from other parties including the appellant on the concerns and suspicions of the residents as verification was already sought from the source, which is the Chairman of BCAC. The respondents felt that taking any further steps to verify with the appellant would be akin to seeking confirmation from the appellant as to whether the residents were indeed concerned.

[35] Further, the respondents contended that the first article is a follow-up report of the news already carried by *Sin Chew Daily* and *Nanyang Siang Pau*. The expectation that the respondents would have to first scientifically verify that air pollution existed and that it was caused by the appellant prior to publication would be too onerous a duty imposed on the respondents as a news media, handling news as it emerged which is perishable in the course of time.

[36] In any event, the respondents argued that the first article, in itself, unequivocally sets out that the health concerns of the Bukit Koman's residents attributed to the gold mining activities of the appellant were mere suspicions, that the origin and components of the yellow substance were indeterminate and pending laboratory tests. The article also provides that air pollution readings previously furnished by the residents were rejected in other court proceedings.

[37] The appellant on the other hand contended that the learned trial judge had erroneously considered the *Reynolds* privilege defence as a single stage test, ie that the public interest seeps and overrides the consideration of the second stage test of responsible journalism to the extent that the ten points or ten factors were treated not merely as a 'general guideline' but to dismiss its application entirely. In other words, there was absolutely no consideration of Lord Nicholls' ten tests, nor even a measurement by the learned trial judge of the degree of compliance by the respondents with Lord Nicholls' ten tests.

[38] We agree with the counsel for the appellant. Except for seeking

A confirmation from the residents of Bukit Koman through the Chairman of BCAC, Mr Wong Kin Hoang, the verification stops there. There were no attempts or efforts made by the respondents to try to contact other experts in the matter or to contact the appellant to get their side of the story. We do not find the respondents to have acted fairly and responsibly.

B

[39] The trial judge had found that the first article did not make any allegation or criticism against the appellant nor was there any embellishment to its contents. We disagree. The article made very serious allegations that the appellant's gold mining activities using cyanide which is a hazardous chemical C had caused ill health to the villagers, death of wildlife and vegetation, and environmental pollution of Bukit Koman.

[40] The tone of the article is extremely accusatory and damaging to the D appellant. As stated earlier, it accused the appellant as being the cause of the villager's alleged ill health, death of wildlife and vegetation and environmental pollution of Bukit Koman. In fact, if what is stated in the article is true, the appellant may be liable to criminal prosecutions or civil suits and consequently may be fined or be ordered to close down the mines and its license revoked. E These are potential repercussions which the appellant may face due to the publication of the article. Thus in such circumstances, due to the seriousness of the allegations, responsible journalism warrants a fair and balanced reporting where the accused — appellant should be given an opportunity to answer the accuser — respondents. In this context, the respondents are required to take F reasonable steps to verify the information by contacting other experts in the matter or at least contact the appellant to get its side of the story. This, the respondents failed to do and should thus bear the consequence of their failure. Contacting the Chairman of the BCAC in these circumstances was grossly inadequate. As such the respondents cannot rely on the defence of responsible G journalism since the respondents had failed to meet the relevant ten points test as propounded in *Reynolds*.

REPORTAGE

H **[41]** The defence of qualified privilege under the *Reynolds* privilege defence requires the writer/publisher to plead a subjective belief that the statement reported or published, to be true, or, an honest belief in the truth of the statement he made. In the defence of reportage, it is inappropriate to plead the same since the thrust of the defence is the neutrality stance taken by the I writer/publisher.

[42] The doctrine of reportage emerged from the case of *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634; [2000] EMLR 215 where the Court of Appeal held that neutral reporting without

adopting or endorsing the report is protected as long as both sides of the dispute have been fairly reported in a disinterested manner by a newspaper. It goes further to state that failure to attempt verification will not vitiate the defendant's plea of qualified privilege.

[43] In *Jameel and another v Wall Street Journal Europe SPRL*, reportage was recognised as another form of *Reynolds* privilege defence. Lord Hoffman observed that the *Reynolds* privilege defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true. Lord Hoffman went on further to state that 'But there are cases ('reportage') in which the public interest lies simply in the fact the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth. In either case, the defence is not affected by the newspaper's inability to prove the truth of the statement at trial'.

[44] In *Roberts and another v Gable and others* [2008] 2 WLR 129, reportage is seen as a defence of qualified privilege. Ward LJ stated tha its place in the legal landscape is clear. It is a form of, or a special example of *Reynolds* qualified privilege, a special kind of responsible journalism but with distinctive features of its own. At pp 153–155, Ward LJ outlines the proper approach to the reportage defence.

> Reportage and *Reynolds* qualified privilege
>
> 60 Once reportage is seen as a defence of qualified privilege, its place in the legal landscape is clear. It is, as was conceded in the *Al-Fagih* case [2002] EMLR 215 a form of, or a special example of, *Reynolds* qualified privilege, a special kind of responsible journalism but with distinctive features of its own. It cannot be a defence sui generis because the *Reynolds* case [2001] 2 AC 127 is clear authority that whilst the categories of privilege are not closed, the underlying rationale justifying the defence is the public policy demand for there to be a duty to impart the information and an interest in receiving it: see p 194 G. If the case for a generic qualified privilege for political speech had to be rejected, so too the case for a generic qualified privilege for reportage must be dismissed.
>
> The proper approach to the reportage defence
>
> 61 Thus it seems to me that the following matters must be taken into account when considering whether there is a defence on the ground of reportage:
>
> (1) The information must be in the public interest.
>
> (2) Since the public cannot have an interest in receiving misinformation which is destructive of the democratic society (see Lord Hobhouse of Woodborough in the *Reynolds* case, at p 238), the publisher will not normally be protected unless he has taken reasonable steps to verify the truth and accuracy of what is published: see, also in the *Reynolds* case, Lord Nicholls's factor 4, at p 205 B, and Lord Cooke, at p 225, and in the *Jameel* case [2007] 1 AC 359, Lord Bingham of Cornhill, at para 12 and Baroness Hale, at para 149. This is where reportage parts company with the *Reynolds*

case [2001]2 AC 127. In a true case of reportage there is no need to take steps to ensure the accuracy of the published information.

(3) The question which perplexed me is why that important factor can be disregarded. The answer lies in what I see as the defining characteristic of reportage. I draw it from the highlighted passages in the judgment of Latham LJ in the *Al-Fagih* case [2002] EMLR 215, paras 65, 67–68 and the speech of Lord Hoffmann in the *Jameel* case [2007] 1 AC 359, para 62 cited in paras 39 and 43 above. To qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made. Those familiar with the circumstances in which hearsay evidence can be admitted will be familiar with the distinction: see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 969. If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth.

(4) Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning. It is not enough for the journalist to assert what his intention was though his evidence may well be material to the decision. The test is objective, not subjective. All the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material.

(5) This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way. Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check accuracy of his report.

(6) To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept has developed from the *Reynolds* case [2001] 2 AC 127, the burden being on the defendants. In this way the balance between article 10 and article 8 can be maintained. All the circumstances of the case and the ten factors listed by Lord Nicholls adjusted as may be necessary for the special nature of reportage must be considered in order to reach the necessary conclusion that this was the product of responsible journalism.

(7) The seriousness of the allegation (Lord Nicholls's factor 1) is obviously relevant for the harm it does to reputation if the charges are untrue. Ordinarily it makes verification all the more important. I am not sure Latham LJ meant to convey any more than that in para 68 of his judgment in the *Al-Fagih* case [2002] EMLR 215 cited in para 39 above. There is, however, no reason in principle why reportage must be confined to scandal-mongering as Mr Tomlinson submits. Here equally serious allegations were being levelled at both sides of this dispute. In line with factor 2, the criminality of the actions bears upon the public interest which is the critical question: does the public have the right to know the fact that these allegations were being made one against the other? As Lord Hoffmann said in the *Jameel* case [2007] 1 AC 359, para 51:

> The fact that the material was of public interest does not allow the newspaper to

drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article.

All the circumstances of the case are brought into play to find the answer but if it is affirmative, then reportage must be allowed to protect the journalist who, not having adopted the allegation, takes no steps to verify his story.

(8) The relevant factors properly applied will embrace the significance of the protagonists in public life and there is no need for insistence as preconditions for reportage on the defendant being a responsible prominent person or the claimant being a public figure as may be required in the USA.

(9) The urgency is relevant, see factor 5, in the sense that fine editorial judgments taken as the presses are about to roll may command a more sympathetic review than decisions to publish with the luxury of time to reflect and public interest can wane with the passage of time. That is not to say, as Mr Tomlinson would have us ordain, that reportage can only flourish where the story unfolds day by day as in the *Al-Fagih* case. Public interest is circumscribed as much by events as by time and every story must be judged on its merits at the moment of publication. (Emphasis added).

[45] As stated earlier, Ward LJ states that reportage is seen as a defence of qualified privilege. It is a form of, or a special example of *Reynolds* qualified privilege, a special kind of responsible journalism but with distinctive features of its own. From the illustration by Ward LJ at para 61(5) above, it seems to permit the defence of reportage and responsible journalism to be pleaded in the alternative, in that if the defence of reportage fails, then the defendant can still fall back on the defence of responsible journalism: 'Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check accuracy of his report'.

[46] In *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750, Sedley LJ, sitting in the Court of Appeal at para [91] appeared to take the view that the defence of reportage and the defence of responsible journalism were incompatible in that once a defendant has relied on the defence of reportage it makes it forensically problematical to fall back upon an alternative defence of responsible journalism and due to this difficulty, pleaders may need to decide which it is to be; reportage or responsible journalism:

[91] The reportage doctrine developed in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634; [2002] EMLR 215 cannot logically be confined to the reporting of reciprocal allegations. A unilateral libel, reported disinterestedly, will be equally protected. Although no reference was made in the case to the decision of the Second Circuit Court of Appeals in *Edwards v National Audubon Society Inc* (1977) 556 F 2d 113, *Al-Fagih*'s case reflects this now classic limb of First Amendment jurisprudence. But the present case bears no substantive resemblance to either of those cases, nor to the case recently decided by this court of *Roberts v Gable* [2007] EWCA Civ 721; (2007) 151 Sol Jo LB 988. These were all

A cases of a self-contained account of a dispute, libellous in its content but reported without adoption or more than marginal embellishment. It is the very dependence of a reportage defence on the bald retailing of libels which makes it forensically problematical to fall back upon an alternative defence of responsible journalism. Pleaders may need to decide which it is to be. (Emphasis added.)

B

[47] Back to home ground in Malaysia, the Court of Appeal in *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191, had rejected the defence of reportage due to the fact that reportage was not pleaded and not relied upon at trial, that the allegation of facts was made without any source C and there was an adoption of facts by the defendants as their own in the publication.

[48] In *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492, Harminder Singh JC (now Court of Appeal D judge), held that reportage would only apply in cases where there is an ongoing dispute, where allegations from both sides are being reported in a fair, disinterested and neutral way. The defence of reportage was not available in this case because only the version of one side was reported and the journalist had put forward his view of what is the truth:

E

> [76] From a consideration of the cases cited, it can be safely asserted that reportage would normally apply as follows. It would only apply in cases where there is an ongoing dispute where allegations of both sides are being reported. The report, taken as a whole, must have the effect that the defamatory material is attributed to the parties in the dispute. The report must not be seen as being put forward to F establish the truth of any of the defamatory assertions. This means that the allegations must be reported in a fair, disinterested and neutral way. The important consideration here is that the allegations are attributed and not adopted. Therefore, reportage will not apply where the journalist had embraced, garnished and embellished the allegations.
>
> G [77] In the instant case, the defendants submitted that this was a classic case of reportage as SD1 was merely reporting from the New Republic article. It was a report from another report and did not carry her own views or comments on the subject-matter in question. And that was why it did not carry the name of the author.
>
> H [78] After due consideration, I am not persuaded that this was indeed a case of reportage. *The article is not about a continuing dispute between parties. Even if it can be said to be a dispute, there is only the version of one side. The reason why reportage is available as a defence is because both versions of defamatory allegations as well as the responses are reported and the journalist takes no further part in putting forward his or* I *her view of which is the truth*. This is certainly not the case here.
>
> [79] Seen as such, the article is certainly not put forward in a fair, disinterested and neutral fashion because it does not contain the version of the other side of a dispute, if at all there is a dispute. I also do not think that this is a neutral report because what SD1 is trying to do, as she herself admits, is to explore the links between APPC,

Douglas Paal, the funding by the Malaysian government and the plaintiff. Her intention, therefore, is not mere neutral reporting but to assert something more sinister on the part of the plaintiff than what had appeared in the New Republic article. She was in a sense adding her own spice and putting 'meat on the bones' (see *Associated Newspapers Ltd & Ors v Dingle* [1964] AC 371 at p 411 per Lord Denning) and making what I considered to be independent inferences. I am therefore unable to accept her subsequent assertions that her article was a mere reproduction. In any case, this had to be decided objectively and taking the effect of the article as a whole, the impugned article is not one that is reported in a fair, disinterested and neutral way. In the circumstances, the defence of reportage is not available to the defendant.

[80] In the result, the defendants are liable to plaintiff for damages for defamation. (Emphasis added.)

THE SECOND ARTICLE WITH LINK TO THE FIRST VIDEO AND THE THIRD ARTICLE WITH LINK TO THE SECOND VIDEO

[49] The findings of the learned trial judge on this issue of reportage can be found at paras 26–27 of her judgment:

[26] As for the second article with link to the first video and the third article with link to the second video, it cannot be denied that these were reproductions of the two press conferences held on 21 June 2012 and 2 August 2012. There is no evidence that the first defendant as publisher of those articles and videos, the third defendant as author of the second article, the fourth defendant as author of the third article and DW3 as the videographer of the first and second videos adopted the contents of those articles and videos as their own. As I have alluded to, the said articles and videos are matter of public concern where the public in general has the right to know the information and the defendants as media and journalists were under, at least a moral duty to publish the same.

[27] Further, it is my judgment that the defence of reportage is clearly available to the defendants with regard to the publication of the second and third articles and the first and second videos. It is not so much the truth of the contents of the said articles and the videos that matters, but rather the fact that they were reproduction of the two press conferences held by BCAC, first on 21 June 2012 and, second on 2 August 2012. *Malaysiakini* and other medias had received invitation to attend the two press conferences. The defence of reportage is therefore available to the defendants because the public interest here lies not in the truth of the contents of the said articles and video, but on the fact that they had been made. The two press conferences held by BCAC themselves, in my view, were matters of public interest. I am aware of the general principle that a person who repeats the defamatory word of another will also be liable to the person defamed. However, it has been said that the *Reynolds* privilege of reportage appears to be the exception to the so-called general rule of exception.

[50] Further at para 28 of her judgment, on the need to plead reportage, the learned trial judge stated as follows:

A [28] The plaintiffs counsel submitted that the defendants have not specifically pleaded reportage in their defence and as such should not be allowed to rely on this particular defence. I merely wish to say that reportage is one form of the *Reynolds* privilege and it is considered part of the qualified privilege defence. The defendants have pleaded qualified privilege as one of their defences to the plaintiffs claim in
B paras 33 and 35 of the defence. In my opinion that would be sufficient to enable the defendants to prove reportage at the trial of the action.

[51] The findings of the learned trial judge at paras 26–27 of her judgment are that the defence of reportage is available to the respondents since they are
C publishing not the truth of the contents of the said articles and videos but rather on the fact that they had been made and in so doing the respondents did not adopt the contents of those articles and videos as their own.

[52] Further at para 28 of her judgment, the learned trial judge state that
D since reportage is one form of the *Reynolds* privilege and it is considered as part of the qualified privilege defence, it suffices, as in this case, that the defendant had pleaded qualified privilege as one of their defences to the plaintiff's claim in paras 33 and 35 of their defence to enable them to prove reportage at trial.
E in other words, the learned trial judge opined that reportage need not be specifically pleaded.

[53] The respondents contended that the exposition of the learned trial judge on reportage is correct in that:

F (a) the information was plainly of public interest;

(b) it was not disputed by the appellant that the impugned statements were made at the press conferences. The articles and videos were a reproduction or a republishing of the impugned statements. Under
G reportage as set out in *Roberts*, the law does not require the defendant to establish the truth of what was reported; and

(c) *Roberts*, provides that the defendant need not take steps to verify the accuracy of the statements but cannot embellish the facts or make it his
H own. In this regard, the articles and videos were published in a neutral and disinterested way without adopting the truth of what was said. They were reproductions of what was said. This is unequivocally borne out from the appellant's counsel cross-examination of the respondents themselves and their witnesses.

I **[54]** As to the failure by the respondents to expressly plead reportage (it was only raised in submission after full trial), the respondents submitted that a plea of responsible journalism under para 35 of their defence would be sufficient for reportage to be relied upon as a defence and for evidence to be adduced at trial.

[55] The appellant on the other hand submitted that there was no basis to support a plea of reportage since the articles and videos published were not of public interest and the reporting was not done in a balanced, fair, disinterested and neutral manner since the respondents had taken a position in favour of the BCAC and without publishing the views or position of the appellant. A B

[56] The appellant argued that the defence of reportage was only raised for the very first time in the closing submissions of the respondents before the trial judge. The appellant submitted that the respondents cannot rely on reportage under the plea of qualified privilege since the defence of qualified privilege and the defence of reportage are separate and distinct defences requiring them to be pleaded separately. Further, the respondents had failed to plead reportage and this is fatal and it precluded them from relying on its defence. C

[57] The question here is, whether the learned trial judge is correct. Was there an ongoing dispute where allegations from both sides were being reported in a fair, disinterested and neutral manner by the respondents and without the respondents embracing, garnishing and embellishing the allegations. And does a plea of qualified privilege at para 33, and in the alternative, a plea of responsible journalism at para 35 of the defence, without an express plea of reportage, suffice, for the respondents to rely on reportage in its defence and prove reportage at trial. D E

[58] *We shall first answer the issue whether the defence of qualified privilege and the defence of reportage are separate and distinct defences.* In doing so, we reiterate what was stated earlier to emphasise our point. F

[59] In *Jameel and another*, reportage is recognised as another form of *Reynolds* privilege defence. Lord Hoffman observed that the *Reynolds* privilege will not get off the ground unless the journalist honestly and reasonably believed that the statement was true. But there are cases ('reportage') in which the public interest lies simply in the fact the statement was made, where it may be clear that the publisher does not subscribe to any belief in its truth. In either case, the defence is not affected by the newspaper's inability to prove the truth of the statement at trial. G H

[60] We have made our observations on *Roberts and another* that reportage is 'a form of, or a special example of *Reynolds* privilege, a special kind of responsible journalism but with distinctive features of its own'. Given the illustration by Ward LJ at para 61(5), it appears that the defence of reportage and responsible journalism may be pleaded in the alternative, in that if the defence of reportage fails, then the defendant can still fall back on the defence of responsible journalism. I

[61] In *Flood v Times Newspapers Ltd* [2012] 2 WLR 760 Lord Phillips explained reportage as 'a special, and relatively rare form of *Reynolds* privilege. It arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made. It protects the publisher if he has taken proper steps to verify the making of the allegation and provided that he does not adopt it'.

[62] In *Charman* Sedley LJ at [91] appeared to take the view that the defences of reportage and responsible journalism were incompatible in that once a defendant has relied on the defence of reportage it makes it forensically problematical to fall back upon an alternative defence of responsible journalism and due to this difficulty, pleaders may need to decide which it is to be; reportage or responsible journalism.

[63] From the cases above, it can be concluded that reportage is in essence a defence of qualified privilege. In fact, it is treated 'as a form of, or a special example of *Reynolds* privilege, a special kind of responsible journalism but with distinctive features of its own'. Even though it is distinct in its features, it still, as stated in para 61(6) of the illustration by Ward LJ in *Roberts & another*, has 'to fulfil the ten factors listed by Lord Nicholls, adjusted as may be necessary, for the special nature of reportage, in order to reach the necessary conclusion that this was the product of responsible journalism'. Therefore, though reportage emanates from the same product (responsible journalism), due to it having its own distinctive, special features, we are of the view that it has to be treated as a distinct and separate defence from responsible journalism or qualified privilege.

[64] *Next, we shall consider whether a plea of qualified privilege at para 33, and in the alternative, a plea of responsible journalism at para 35 of the defence, without an express plea of reportage, is sufficient to enable the Respondents to rely on its defence and prove reportage at trial.*

[65] It is trite law that a defendant is precluded from relying on a defence which was not specifically pleaded in its defence: *Tan Ah Tong v Parveen Kaur* [2011] 5 MLJ 428 (CA):

> [19] The existence of coercion, undue influence, fraud, misrepresentation or mistake (or any of them) if proven, may negate the element of consent by the defendant (as he alleged), in entering into the SPAs. In order to prove any of the elements above, it must first be specifically pleaded by the defendant in his statement of defence as required under O 18 rr 8 and 12 of the Rules of the High Court 1980. Failure to specifically plead any of those elements is fatal to the defendant's case. In the present case, the defendant has failed to specifically plead any of those elements, in his statement of defence. Therefore, the defendant cannot in law rely on any of those defences.

[66] The trial judge allowed the respondents to raise the defence of reportage in their submission at the post-trial stage even though the respondents had not specifically pleaded the defence of reportage in their defence. As such, this defence was not within the contemplation of the parties. The fact that it is not within the contemplation of the parties is unfair and prejudicial to the party against whom such a defence is levelled. This is the underlying reason why parties are bound to their pleaded case: see *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015]6 MLJ 449 (FC):

> [42] Now, it is trite law that the plaintiff is bound by its own pleadings (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Anjalal Anmal & Anor v Abdul Kareem* [1969] 1 MLJ 22; *Gimstem Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (SC); *Joo Chin Kia v Loh Seng Tek* [1987] 1 CLJ 194; *KEP Mohamed Ali v KEP Mohamad Ismail* [1981] 2 MLJ 10 (FC)). The plaintiff is not permitted to improve its pleading in any other manner other than by way of an application to amend. Otherwise it would be unfair and prejudicial to the defendants if the plaintiff could now be allowed to raise an issue that was not within the contemplation of the parties in the first place (see *Esso Petroleum Co Ltd v SouthPort Corpn* [1956] AC 218; *Playing Cards (M) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182 (FC)).

[67] In the case of *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665, the Federal Court similarly criticised the Court of Appeal for dealing with the appeal on an unpleaded issue, finding that the proposition of the Court of Appeal was not even pleaded by the respondent and that parties must abide by their pleadings and it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties.

[68] In *Harry Isaacs & Ors*, the Court of Appeal had rejected the defence of reportage due to the fact that the defence of reportage was not pleaded and not relied upon at trial, that the allegation of facts was made without any source and there was an adoption of facts by the defendants as their own in the publication.

[69] In the light of the above cases, we are of the considered view, that the learned trial judge had erred when she found that the respondents could rely on the defence of reportage by just pleading the defence of qualified privilege. Likewise, the respondents' contention that a defendant can rely on the defence of reportage by just pleading the defence of responsible journalism is plainly wrong. As stated earlier, the defence of reportage has distinctive features of its own which sets it apart from the defence of responsible journalism or qualified privilege. As such, to enable the respondents to rely on this defence, it has to be expressly pleaded so as not to take the parties or the appellant by surprise, and by failing to do so, will preclude the respondents from relying on its defence or

A from proving reportage at trial. We further agree and share the view of Sedley LJ that the defence of reportage and responsible journalism are in effect mutually exclusive and incompatible in that once a defence of reportage is relied on, it is 'forensically problematical to fall back upon an alternative defence of responsible journalism'. In the case of reportage, there is, inter alia, complete
B neutrality which infers a state of mind and intent whereas in responsible journalism a view may be justifiably proffered. The respondents in our view must decide which is to be pleaded, reportage or responsible journalism at the time of finalising their pleadings. Pleading in the alternative does not work here.
C

[70] In the event that we may be wrong, and a plea of qualified privilege or a plea of responsible journalism can indeed encompass a plea of reportage, and thus do away with the need to expressly plead it, then the evidence of the
D witnesses have to be examined to see whether the defence of reportage was indeed relied upon and made out by the respondents at trial.

[71] To qualify as reportage, the report, judging the thrust of it as a whole, and viewed objectively, must have the effect of reporting not the truth of the
E statements, but the fact that they were made.

[72] Apart from that, the respondents have to show that there was an ongoing dispute, where allegations from both sides were being reported in in a fair, disinterested and neutral manner, without the respondents embracing,
F garnishing or embellishing the allegations. In other words, the reporting was fair and balanced and not one-sided, in that only the version of one side is reported. Further, the respondents must not adopt or subscribe to the articles and videos published as their own.

G **[73]** It must be noted that the ten points in *Reynolds* has to be considered, though adjusted, as may be necessary, to accommodate the special nature of reportage. This was stated by Ward LJ at para 61(6) of *Roberts and another* that 'To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept (reportage) has
H developed from the *Reynolds*, the burden being on the defendants. In this way the balance between article 10 and article 8 can be maintained. All the circumstances of the case and the ten factors listed by Lord Nicholls adjusted as may be necessary for the special nature of reportage must be considered in order to reach the necessary conclusion that this was the product of responsible
I journalism'.

[74] Applying the principles as enunciated above, and after perusing the evidence and the articles and videos as a whole, and viewing it objectively, we are of the considered view that the respondents had failed to meet the

requirements of the defence of reportage for the following reasons:

(a) the respondents reported only the version of one side of the dispute, that is the version of the Bukit Koman community and the opposition politicians;

(b) since the allegations were extremely serious and damaging and may lead to criminal prosecutions and civil suits being brought against the appellant if the allegations were true, no attempts were made to contact any independent bodies such as the Department of Environment, the Department of Minerals and Geoscience or the Ministry of Health prior to publication of the articles and videos to show that the respondents were neutral and not taking sides;

(c) the cavalier and reckless attitude of the respondents is evident and they are as follows:

(i) as editor-in-chief, DW1 did not even read the articles and videos before they were published;

(ii) no attempts were made by the respondents to view any pnmary documents before publishing the articles and videos; and

(iii) at no time did the first respondent sight the so-called survey prepared by the BCAC;

(d) the second article and the first video carried allegations by Ms Hue Shieh Lee made in a *Malay Mail* article dated 31 July 2012 that the ill health of the villagers of Bukit Koman was caused by the appellant's mining activities. Such allegations have since been refuted by a press statement issued by the Ministry of Health and published in the national newspaper. The Ministry of Health's Press Statement also cited Ms Hue Shieh Lee as having agreed that cyanide was not the cause of the villager's ill health. With that admission, it is plain and clear that all the allegations in the second article and first video are false and without basis. In these circumstances, the respondents should have contacted the appellant to get the appellant's response and side of the story so as to maintain a balanced reporting. The respondents failed to do this;

(e) the tone of the third article was extremely accusatory with imputations and odious allegations on the appellant. Such tone is not neutral, is unbalanced and is unfair as it did not carry both versions to the dispute. It merely carried the version of the opposition politicians who, it would appear, were exploiting the issue at Bukit Koman to gain political mileage;

(f) that Wong Kin Hoang has since apologized for his statements which unfairly accused the appellant of polluting the environment 24 hours every day and that the appellant has harassed those who speak up against

A it on the basis that there is no justification. Despite such apology there was no apology or retraction by the respondents; and

(g) similarly, the second video also falls foul of the defence of reportage for the same reasons as above.

B

[75] To summarise, the respondents had failed to show that in the ongoing dispute, the allegations made against the appellant were being reported in a fair, disinterested and neutral manner without the respondents embracing, garnishing and embellishing the allegations. In other words, the reporting of C the impugned statements were unbalanced since the version of one side, (that of the Bukit Koman community and the opposition politicians), were showcased and given prominence. Though there were five other neutral articles being published in the respondent's website at about the same time as the publication of the impugned statements, these five articles, to our minds, are D neutralised by the impugned statements. This is so since the impugned statements in the articles and videos were not merely couched in sarcastic tone which may be permissible as a journalistic device but couched in an extremely accusatory and damaging tone which goes beyond mere neutral reporting. In fact, in comparison to the other articles reported on the same matter in other E newspapers or media, the reporting by the respondents assert something more sinister on the part of the appellant. As such, the respondents impugned publications were slanted towards bias against the appellant.

F **[76]** Thus, after perusing the articles and videos and taking it as a whole and viewed objectively, we are of the considered view that the respondents had not only embellished the allegations but have embraced and adopted them as the truth and as their own. In such circumstances, the respondents are not entitled to avail themselves to the defence of reportage. In the upshot, we find the G learned trial judge in her judgment had clearly failed to judicially appreciate in part the relevant evidence before her and had erred in misconstruing the facts and law on qualified privilege, responsible journalism and reportage which errors merit our appellate intervention. For these reasons, the appellant's appeal is allowed.

H

MALICIOUS FALSEHOOD

[77] Although we have found the defences of responsible journalism and reportage not established and while malice may be inferred from the conduct of I the journalists, we do not see any evidence of malice on the part of the respondents. The conduct of the respondents displayed irresponsible journalism and partiality in their reporting which cannot be justified under the cover of public interest. Be that as it may, such conduct is still not sufficient to constitute malice for a cause of action premised on malicious falsehood. In this

regard, we therefore agree with the findings of the learned trial judge and dismiss this ground of appeal.

DAMAGES

[78] Having dismissed the appellant's claim, the learned trial judge did not see it necessary to deal with the issue of damages. In view of our findings above, it therefore falls upon this court to assess the same.

[79] The appellant prayed for general, exemplary and aggravated damages, costs and interest. The appellant requested for a global sum taking into consideration the appellant's standing in society as a company in Malaysia and the stigmatic effect of the respondents' articles and videos on the appellant's trading reputation. A base sum of RM500,000 was suggested.

[80] The respondents submitted that there ought not to be any exemplary and aggravated damages awarded, and, should there be any general damages awarded, it should be a sum at the lower spectrum of the quantum of damages for defamation. A global sum of RM100,000 was suggested.

[81] In assessmg damages for libel, the factors to be taken into consideration are set out in the case of *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807:

> In determining quantum of damages the following factors are taken into consideration:
>
> (a) the conduct of the plaintiff;
>
> (b) the plaintiffs position and standing in society;
>
> (c) the nature of the libel;
>
> (d) mode and extent of publication;
>
> (e) the absence or refusal of retraction or apology; and
>
> (f) the whole conduct of the defendant from the time the libel was published down to the very moment of the verdict.

[82] The appellant's position and standing in society is derived from its status as a company in Malaysia. As a company duly incorporated in Malaysia, the appellant's reputation and standing would have suffered due to the grievous allegations levelled by the respondents. To what extent the appellant's business or trade is affected financially due to these articles and videos was not ventilated or substantiated at trial.

[83] Be that as it may, the serious nature of the libel which accuses the gold

A mining operations of the appellant as dangerous and the cause of ill health, death and destruction of wildlife and vegetation and pollution to Bukit Koman and its rivers merits an award of damages to be given by this court. This is so since the respondents did not exercise responsible journalism and neither was reportage proven. In the light that the allegations, if true, may lead to criminal B prosecutions and civil suits being leveled at the appellant and the possibility of a fine or the gold mine being closed down and the appellant's license revoked, the attitude of the respondents which was reckless in that they did not try to verify with other experts or with the appellant or even publish a retraction at the earliest opportunity is reason enough for us to award damages.

C

[84] On the mode and extent of publication, we have the evidence of PW4 who testified that the articles were republished in other websites. According to PW4, the articles were republished 80 times but 17 of these republished articles could not be located by him. Out of the said 80 articles, approximately 70 D articles could not be confirmed by him to have been visited by readers. As for the first respondent's website, there are 15,000 subscribers and 2.5m readers per month. However, there has not been any evidence to show how many of the subscribers or readers have access to the articles and the videos.

E

[85] What troubles us the most in this case is the attitude of the respondents: the absence or sheer refusal of retraction or apology. The whole conduct of the appellant from the time the libel was published till it was discovered that the source of the illness and pollution was due to herbicide pollution and not the F use of sodium cyanide in the appellant's gold mine, was unyielding, unrepentant and arrogant.

[86] As submitted by the appellant's counsel, the appellant had afforded the respondents the opportunity to apologise and retract the articles and videos since 27 July 2012 but the respondents refused. Instead of trying to mitigate G the damage done by their articles and videos, the respondents took the position that the articles and videos shall remain accessible on the first respondent's website for perpetuity.

H **[87]** In such circumstances, what is a fair and suitable amount of damages to be awarded to the appellant.

[88] It is trite law that a company may sue in libel to protect its reputation. The company or corporation need not prove actual damage since the injury I need not necessarily be confined to loss of income but to the loss of goodwill and reputation.

[89] In *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234, it was held that:

A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money. *The injury need not necessarily be confined to loss of income. Its goodwill may be injured.* (Emphasis added.)

[90] In *Jameel*, Lord Scott had gone to great lengths to espouse both the law and policy behind the time-honoured rule that a plaintiff company need not be required to show actual damage to obtain damages for libel. It was agreed in this case that it is the reputation of the corporate body which is the asset of value which if it has been tarnished by the libel need to be compensated for. The case of *English and Scottish Co-Operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd and Another* [1940] 1 All ER 1; [1940] 1 KB 440 was cited where the dictum of Goddard LJ was emphasised that the primary purpose of an award of damages in a libel action, where no actual damage caused by the libel has been pleaded or proved, is not compensation but vindication of reputation:

119 Defamation constitutes an injury to reputation. Reputation is valued by individuals for it affects their self-esteem and their standing in the community. Where reputation is traduced by a libel 'the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights': Bowen LJ in *Ratcliffe v Evans* [1892] 2 QB 524, 528. It is accepted that the rule applies and should continue to apply to individuals. But it is argued that it should no longer be applied to corporations. Corporations, it is said, have no feelings to be hurt and cannot feel shame. If they are to sue for libel they should be required to show that the libel has caused them actual damage.

These arguments, in my opinion, miss the point. *The reputation of a corporate body is capable of being, and will usually be, not simply something in which its directors and shareholders may take pride, but an asset of positive value to it.* (Emphasis added.)

121 It seems to me plain beyond argument that reputation is of importance to corporations. Proof of actual damage caused by the publication of defamatory material would, in most cases, need to await the next month's financial figures, but the figures would likely to be inconclusive. Causation problems would usually be insuperable. Who is to say why receipts are down or why advertising has become more difficult or less effective? Everyone knows that fluctuations happen. Who is to say, if the figures are not down, whether they would have been higher if the libel had not been published? How can a company about which some libel, damaging to its reputation, has been published ever obtain an interlocutory injunction if proof of actual damage is to become the gist of the action?

123 *English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440 was a case in which a society registered under the Industrial and Provident Societies Act 1893 (56 & 57 Viet c 39) complained of an article in the 'Daily Herald' commenting on the way in which the society had kept its accounts and insinuating that the figures had been deliberately falsified and that the society had carried on business 'by dishonest methods': p 450. Slesser LJ commented that 'A more terrible indictment of a society of this kind it is difficult to

imagine': pp 450–451. The jury found these insinuations to be false. But the society had neither alleged nor proved any special damage and the jury, inadequately directed by the trial judge, had awarded damages of one farthing. The society successfully appealed and the case was remitted for a retrial limited to the issue of quantum of damages. Slesser LJ said, at p 455:

> I cannot help feeling that ... the jury must have come to the conclusion that in so far as they were not satisfied that the company had lost any business, they must treat the damages as quite nominal or trivial. If they did go into their deliberations with that view they were entirely in error. A libel by the invasion of a legal right gives a right to damages. It is the duty of a jury to assess those damages, which may be punitive or contemptuous, or, in an ordinary case, may be such as would recompense the plaintiff for the wrong done to his reputation.

Goddard LJ said, at p 461:

> There is no obligation on the plaintiffs to show that they have suffered actual damage. A plaintiff may, if he can, by way of aggravating damages, prove that he has suffered actual damage. But in every case he is perfectly entitled to say that there has been a serious libel upon him; that the law assumes that he must have suffered damage; and that he is entitled to substantial damages.

All of this was said of a corporate industrial and provident society whose reputation had been besmirched by the libel. And it is to be borne in mind that the primary purpose of an award of damages in a libel action, where no actual damage caused by the libel has been pleaded or proved, is not compensation but vindication of reputation. (Emphasis added.)

[91] The importance of the policy of vindication is echoed in *Applause Store Productions Ltd and another v Raphael* [2008] EWHC 1781 (QB) where the court held that since a company stands in a slightly different position than an individual claimant as it has no feelings to hurt, a company can only recover for general damages and not for aggravated damages.

> 76. Of course, a company stands in a slightly different position, for it has no feelings to hurt, and it follows that considerations of aggravation which might be relevant if the claimant is an individual do not apply. However, the entitlement of a company to recover general damages has recently been affirmed by the House of Lords: see *Jameel v Wall Street Journal* [2007] 1 AC 359. A company's good name is a thing of value, but it can only be hit in its pocket, and there is no evidence here of actual financial loss. That is not to say that it may not merit vindication ...

[92] In the light of the above cases, since actual damage is not proven, we will award general damages for loss of goodwill and for vindication of reputation. Taking all the facts and circumstances of the case, we are of the view that a global sum of RM200,000 is adequate as general damages for all the three articles and two videos.

CONCLUSION

[93] For the cumulative reasons stated, we are of the unanimous view that the learned trial judge had erred in fact and in law in arriving at her decision which merits our appellate intervention. We therefore allow the appeal for prayers 39(a) general damages and prayers 39(iv)–(v) for an injunction restraining the respondents or its officers, servant, agents from further publishing, circulating and distributing the articles and videos. We further ordered costs for here and below in the sum of RM150,000 to be paid to the appellant subject to the payment of allocator fees. This sum is reasonable having regard, inter alia, to the complexity of the issues raised before us. Deposit to be refunded.

Appeal allowed with costs.

Order accordingly.

Reported by Ashok Kumar